Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

NATIONWIDE MUTUAL INSURANCE COMPANY and NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Petitioners,

v.

HENRY CISNEROS, Secretary of the United States Department of Housing & Urban Development; JERALD L. STEED, Executive Director, Dayton Human Relations Council; CHARLES W. BROWN, Chairperson, Dayton Human Relations Council; and CITY OF DAYTON,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONERS' REPLY MEMORANDUM

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TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) .. 5, 7, 8

American Federation of Labor, AFL-CIO v. Donovan, 757 F.2d 330 (D.C. Cir. 1985) 3

Batterton v. Francis, 432 U.S. 416 (1977) 3

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 4, 5

Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967) 7

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 4, 5

Kenty v. Bank One, 67 F.3d 1257 (6th Cir. 1995) 10

Mackey v. Nationwide Ins. Cos., 724 F.2d 419 (4th Cir. 1984) 2, 3, 4

Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co., 50 F.3d 1486 (9th Cir.), *cert. denied*, 116 S.Ct. 418 (1995) 10

NAACP v. American Family Mutual Ins. Co., 978 F.2d 287 (7th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2335 (1993) 2, 3, 9, 10

NLRB v. United Food & Commercial Workers Union, 484 U.S. 112 (1987) 5

Rust v. Sullivan, 500 U.S. 173 (1991) 8

STATUTES

15 U.S.C. § 1012(b) 8

42 U.S.C. § 3604(a) 4, 7

42 U.S.C. § 3604(b) 4

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 3604(f) 7

42 U.S.C. § 3614a 3

Ohio Rev. Code § 3901.011 9

Ohio Rev. Code § 3901.21(M) 6

Ohio Rev. Code § 3901.22 9

Ohio Rev. Code § 3901.43 6

Ohio Rev. Code § 3929.41, *et seq* 9

PETITIONERS' REPLY MEMORANDUM

1. The questions presented by this petition – whether the Fair Housing Act regulates the provision of property insurance, whether the interpretive regulation of the United States Department of Housing & Urban Development ("HUD") is entitled to substantial deference on this pure question of statutory construction, whether there should be pre-enforcement judicial review of HUD's definitive intention to engage in disparate impact regulation of the day-to-day business of property insurance, and whether the existence of additional remedies under the Fair Housing Act invalidates, impairs or supersedes state insurance law in contravention of the McCarran Act – are of fundamental importance "to the property insurance industry, homeowners and prospective homeowners, state insurance commissions and numerous civil rights organizations." Pet. at 7. That point is underscored by the *amicus curiae* briefs filed in support of Nationwide's petition.[1] Insurance industry groups have asked this Court to end the "continued" and "extraordinary uncertainty" (NAII Br. at 2 and NAMIC Br. at 2) "over whether they are subject to the regulatory powers of the federal government" and "whether the regulatory framework of the several states remains intact." NAMIC Br. at 3.

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[1] Briefs have been filed on behalf of the property insurance industry by the National Association of Independent Insurers ("NAII"), American Insurance Association ("AIA") and National Association of Mutual Insurance Companies ("NAMIC"); on behalf of state insurance commissioners by the National Association of Insurance Commissioners ("NAIC"); and on behalf of insurance consumers by the Washington Legal Foundation ("WLF").

State insurance regulators have asked this Court to affirm that "rationally based, neutral risk selection criteria" still apply to preserve "insurer solvency, in the best interests of policyholders and claimants." NAIC Br. at 2. The Washington Legal Foundation, too, has raised concerns that additional federal disparate impact regulation will distort "the market for insurance products" and harm "insurance consumers." WLF Br. at 3. HUD does not deny the national importance of the questions raised by Nationwide's petition and the *amici*. Nor does HUD deny that those questions continue to be the subject of unresolved debate and controversy among HUD, the insurance industry and state regulators. Pet. at 9-11.[2]

2. HUD errs in asserting that there is no conflict between the decision below and the Fourth Circuit's decision in *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419 (4th Cir. 1984), over the question of whether the Fair Housing Act applies to insurance. Brief in Opp. at 12 n. 2. While HUD acknowledges that there is "some tension" between the two decisions (and between *Mackey* and the Seventh Circuit's decision in *NAACP v. American Family Mutual Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2335 (1993)), HUD contends that there is no true conflict because *Mackey* was decided before HUD

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[2] The Dayton Respondents have filed an appearance in which they concur in the position taken by HUD. This reply, therefore, will simply refer to "HUD" in addressing Respondents' position.

issued its intervening rules. Brief in Opp. at 12 n. 2.[3] This argument is specious. The differing outcomes in these cases cannot be explained as simple deference to HUD's views. To the contrary, the decision below, in determining "whether the text of the Fair Housing Act addresses the precise issue in this case" (Pet. App. at 9), was squarely at odds with *Mackey* over the following issues of statutory construction: (1) the significance of the lack of any reference to insurance in the Act; (2) the proper conclusion to be drawn from canons of statutory construction; (3) the weight to be placed upon silence in the legislative history, especially in light of the backdrop of the McCarran-Ferguson Act and the different approach embodied by the Urban Property Protection and Reinsurance Act ("UPPRA") enacted in the same year; and (4) Congress' numerous unsuccessful attempts to extend the Act to include insurance. Pet. App. at 10-15. *American Family*, too, disagreed with the reasoning and analysis employed by the Fourth Circuit in *Mackey*. *See American Family*, 978 F.2d at 297-301 (court criticizes merits of

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[3] HUD's characterization of its 1989 regulations as "legislative rules" is simply mistaken. Congress' enactment of a statute conferring upon HUD general authority to "make rules . . . to carry out" the Act (42 U.S.C. § 3614a) does not constitute a legislative delegation for HUD to define the scope of its own jurisdiction. *See e.g., American Federation of Labor, AFL-CIO v. Donovan*, 757 F.2d 330, 342 (D.C. Cir. 1985) (general delegation of authority to the Secretary of Labor to "make . . . rules and regulations necessary to carry out" a federal statute did not "entitle [ ] the Secretary to characterize as legislative rules his interpretation of the congressionally delineated scope of the Act's provisions"). Rather, HUD's 1989 regulations are interpretive, not legislative, rules which are not entitled to "controlling significance." *Batterton v. Francis*, 432 U.S. 416, 424 (1977).

Mackey at length and notes that it doubts "the interpretive methods used in [the *Mackey*] opinion").[4]

3. HUD's attempt to harmonize *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), with other decisions of this Court is unavailing. Brief in Opp. at 16. As HUD concedes (br. in opp. at 6-7), the panel below was split over whether *Chevron* deference applied at all to the interpretation of the Fair Housing Act. The majority applied *Chevron*, while Judge Kennedy, in dissent, relied upon *INS v. Cardoza-Fonseca*, 480 U.S. 421, 445-48 (1987), in refusing to pay deference to HUD's interpretation "[w]here this Court can ascertain Congressional intent through traditional tools of statutory construction . . . " Pet. App. at 29. That split reflects ongoing confusion in the lower courts over the proper application of principles in this area. Pet. at 13-16. Contrary to HUD's contention, *Cardoza-Fonseca* cannot be reconciled with *Chevron*. Indeed, in his concurring opinion in *Cardoza-*

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[4] HUD's response focuses primarily upon defending the merits of the decision below, rather than addressing the importance of the issues involved or the conflicts raised by the Sixth Circuit's decision. Contrary to HUD's contentions, *Mackey* and Judge Kennedy's dissenting opinion below represent the correct position on whether the Fair Housing Act can be construed to cover insurance, especially in light of the McCarran-Ferguson Act which expressly reserves to the 50 states the primary role in the regulation of insurance. Pet App. at 29 ("I do not believe that Congress would have intended to include insurance practices without at least considering the limitations imposed by the McCarran-Ferguson Act.") (Kennedy, J.) See also NAII Br. at 9-12, demonstrating how the legislative history of the Fair Housing Act renders it implausible that Congress intended, *sub silentio*, to cover the insurance industry under the aegis of 42 U.S.C. § 3604(a) and (b).

Fonseca, Justice Scalia expressed strong disapproval of Justice Stevens' majority opinion precisely because it could not be squared with the test set forth in *Chevron*. 480 U.S. at 454 ("[Justice Stevens' approach] is not an interpretation but an evisceration of *Chevron*.") Also, contrary to HUD's response, this Court did not simply reaffirm *Chevron* in *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112 (1987). Brief in Opp. at 16. Rather, Justice Brennan relied primarily upon *Cardoza-Fonseca*, not *Chevron*, in emphasizing that where there is a "pure question of statutory construction," it is the court's first job "to try to determine congressional intent." 484 U.S. at 123. The test enunciated in *Cardoza-Fonseca* and followed by Justice Brennan in *United Food & Commercial Workers* and Judge Kennedy below cannot, contrary to HUD's assertion, be reconciled with *Chevron*.

4. HUD fails to explain how the decision below rejecting Nationwide's McCarran Act challenge to the disparate impact enforcement of the Fair Housing Act can be reconciled with this Court's ripeness decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). HUD contends that "[b]ecause petitioners have not identified any particular underwriting practice that they believe a disparate impact approach will prevent them from employing, petitioners' challenge presents merely an 'abstract disagreement [ ] over administrative polic[y].' " Brief in Opp., pp. 22-23 n. 4, quoting *Abbott Laboratories*, 387 U.S. at 148. HUD misstates the issue and, in any event, ignores the uncontroverted record.[5] The issue is whether Nationwide

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[5] Nationwide identified in the court below specific underwriting practices that would have to be altered to avoid the

has identified specific state insurance laws that would be "impaired, invalidated or superseded" by HUD's undisputed intention to enforce its regulations under a disparate impact approach. Nationwide identified in the court below several state insurance laws that would be impaired by HUD's application of a disparate impact approach. See Pet. App. at 20-21 outlining Nationwide's arguments for impairment of state insurance laws governing "fair discrimination" and for impairment of the Ohio FAIR Plan. *See also*, Ohio Rev. Code §§ 3901.21(M) and 3901.43. The court below, however, never reached Nationwide's arguments because, according to the court, "it is not clear that HUD will apply a disparate impact analysis to its regulation governing insurance providers in the future. . . . " Pet. App. at 26. That conclusion, as Nationwide's petition establishes and HUD does not

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threat of disparate impact enforcement. Those practices are identified in detail in affidavits submitted by Professor Spencer Kimball, Richard Stewart, the former Superintendent of Insurance for the State of New York, and Robert White, Nationwide's Vice President Personal Lines Insurance Services. Sixth Circuit Joint Appendix ("JA") at 300-339, 340-371 and 384-393. In essence, as affiant Stewart stated, the "additional level of [federal] regulation would tend to have a chilling effect upon the proper exercise of underwriting decisions. Litigation concerns are likely to result in increased administrative costs and decisions to underwrite properties in environmentally hazardous areas at rates which are not commensurate with the risk." JA at 388-389. This is contrary to the fundamental underwriting principle that like risks should be treated alike. The *amici*, too, have identified neutral underwriting practices – including consideration of the age of the house and the difference between its replacement cost and market value – which would be affected by disparate impact enforcement. See NAMIC Br. at 16-17, NAII Br. at 15, and WLF Br. at 8-9.

dispute, is belied by HUD's own numerous pronouncements that it intends to apply disparate impact analysis to insurers. Pet. at 17-18 n. 22 and 23.[6]

HUD further contends that this case is not ripe for review under *Abbott Laboratories* "because any application of disparate impact analysis to a particular underwriting practice would involve a highly fact-specific inquiry into the effects of and business justifications for that practice . . . " Brief in Opp. at 23 n. 4, citing *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967). Once again, HUD misstates the issue. It is uncontroverted that the "severe chilling effect" (NAMIC Br. at 17) of the threat of disparate impact enforcement forces insurers, like Nationwide, to alter their pricing and underwriting standards with respect to any of the groups afforded protection under the Fair Housing Act (*see* 42 U.S.C. § 3604(a) and (f), forbidding discrimination on the basis of race, color, religion, sex, familial status, national origin or handicap) at substantial cost, or run the risk of prosecution by HUD and the imposition of substantial penalties if existing standards happen to disproportionately affect a protected

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[6] HUD contends that Ohio's civil rights statute "may already incorporate a prohibition on insurance practices that are discriminatory in effect." Brief in Opp. at 20-21. This does not detract from Nationwide's argument. *First*, unlike HUD, no Ohio court has stated that disparate impact analysis would be applied to insurers. *Second*, regardless of the possible enforcement of Ohio's Civil Rights Act, the McCarran Act forbids federal impairment of *state insurance laws*. HUD has not argued that Ohio insurance law prohibits neutral risk practices which have a disparate effect on those in protected groups.

group.[7] White Aff., ¶¶ 14, 18-20, JA at 305-308. This "dilemma" (*Abbott Laboratories*, 387 U.S. at 153) is not resolved by waiting for HUD or private plaintiffs to challenge those standards on a case by case basis in front of federal juries. By then, the damage has been done. This Court should take this case to affirm that *Abbott Laboratories* applies, and that, therefore, Nationwide's challenge to disparate impact enforcement of the Fair Housing Act is ripe for review.[8]

5. HUD fails to address Nationwide's final point that the decision below rejecting Nationwide's challenge to disparate treatment enforcement is contrary to the plain language of the McCarran Act. HUD contends that

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[7] The "chilling effect" follows from the fact that insurance "is unique." NAII Br. at 13. "[I]nsurers must set their prices without full knowledge of their product's cost and must project future costs by analyzing loss experience data." *Id.* at 14. This "results in the classification of like risks based on a number of objective variables" (*id.*) – a process which is distorted if full consideration of those variables is "chilled" by Fair Housing Act enforcement.

[8] HUD contends, alternatively, that Nationwide's challenge fails not because of lack of ripeness but because it constitutes a "facial challenge" to the validity of HUD's regulation. Brief in Opp., p. 20, citing *Rust v. Sullivan*, 500 U.S. 173 (1991). *Rust*, which involved a challenge to the constitutionality of regulations, is inapposite. Here, Nationwide is not mounting a facial challenge to the constitutionality of HUD's regulations, but rather is contending that *as applied* HUD's regulations will impair state insurance law within the meaning of the McCarran Act. See 15 U.S.C. § 1012(b) ("No Act of Congress *shall be construed* to invalidate, impair or supersede" state insurance law.) (emphasis added).

disparate treatment enforcement would not "create a conflict with a state statute." Brief in Opp. at 19. That is the very error of statutory interpretation committed by *American Family* and the majority panel below. Contrary to HUD's contention, the issue is not whether there is direct "conflict." Rather, the issue is whether an additional layer of federal regulation "impairs, invalidates or supersedes" state insurance law if federal law supplants the state mechanisms already in place. Nationwide demonstrated in detail in the court below how the presence of an additional layer of federal regulation will impair Ohio insurance laws which establish an administrative remedial scheme presided over by the Superintendent of Insurance. *See, e.g.*, Ohio Rev. Code §§ 3901.011, 3901.22. There will also be impairment of the Ohio FAIR Plan which was established under Ohio insurance law. Ohio Rev. Code § 3929.41, *et seq*. The issue is not, as HUD contends, whether an "Ohio statute authorizes or requires insurers intentionally to discriminate on the basis of race." Brief in Opp. at 19. Rather, it is whether the Ohio scheme for regulation of insurance embodied in the Ohio Insurance Code, which contemplates regulation by knowledgeable professional administrators, would be displaced by a federal scheme of *ad hoc* regulation by juries.

HUD asserts that "every circuit to have addressed the issue has concluded that application of the Fair Housing Act" to insurers does not violate the McCarran Act. Brief in Opp. at 17, citing *American Family*. The court in *American Family*, however, inappropriately relied by analogy upon the narrower concept of federal preemption under the Supremacy Clause, rather than upon the actual language of the McCarran Act. As the *amicus curiae* brief

of NAMIC and AIA demonstrates in greater detail, there is a growing conflict among the lower courts over whether the *American Family* "inverse preemption" approach to interpretation of the McCarran Act is correct. NAMIC Br. at 11-12, citing, in particular, conflict between *Kenty v. Bank One*, 67 F.3d 1257 (6th Cir. 1995) and *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486 (9th Cir.), *cert. denied*, 116 S.Ct. 418 (1995), over the application of RICO to alleged fraudulent conduct of insurers in light of the dictates of the McCarran Act. That conflict stems from the erroneous "inverse preemption" analysis utilized in *American Family* and followed by the majority below. This case is an appropriate vehicle both to resolve the conflict in the lower courts and to rectify a serious error in the interpretation of an important federal statute.

Respectfully submitted,

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